Goddard

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Northern Virginia Service Corporation

File: B-224450; B-224450.2

Date: October 21, 1986

DIGEST

Contracting officer acted reasonably and did not prejudice incumbent contractor when he included an old wage determination in the solicitation since a new collective bargaining agreement covering the incumbent contractor's workers did not come into effect until after the proposed start date of the new contract.

DECISION

Northern Virginia Service Corp. (NVSC) protests request for proposals No. GS-05-P-86-GA-C-0051, issued by the General Services Administration (GSA) for custodial and related services at GSA controlled facilities in the metropolitan area of Detroit, Michigan.

The protest is denied.

NVSC, the incumbent contractor, states that on February 18, 1986, it concluded negotiations for a new collective bargaining agreement with the Service Employees International Union, Local 79. NVSC states that since the agreement contained wage and fringe benefits in excess of the wage determination in NVSC's incumbent contract, NVSC's president so advised the contracting officer. NVSC alleges that the contracting officer refused to request a new wage determination from the Department of Labor even though GSA was then soliciting a follow-on contract for the same services.

NVSC had filed a protest on an earlier solicitation for the same services being solicited here, but the solicitation was canceled and NVSC withdrew its protest. The instant solicitation was then issued, but NVSC states that GSA has still failed to correct the earlier raised wage determination problem and that GSA has added a provision which does not reflect the government's minimum needs.

Regarding GSA's failure to request a revised wage determination, NVSC states that the solicitation did contain the following cover sheet:

> "UNION AGREEMENT
>
> The Wage Determination contained in this solicitation does not reflect the current union agreement . . . Enclosed . . . is the latest copy of the collective bargaining agreement . . . Prices . . . should reflect the enclosed agreement."

NVSC contends that since the solicitation also contained the previously applicable wage determination, offerors could be confused as to what they should base their prices on. NVSC advises that the collective bargaining agreement's cover letter, also included in the solicitation, stated that:

> "The effective date will be the first day of performance under the new contract issued by the General Services Administration for cleaning services at the . . . Federal Building for annual services. The base wage will rise from $8.86 per hour to $9.36 per hour for one full year from the start date of the full annual contract for twelve months."

NVSC argues that since the RFP contemplated a 3-month contract with two 1-month options, offerors will construe the above quoted language as only applying to a "full annual contract" and price their offers based on the old wage determination. NVSC states that this will result in confusion and inconsistent pricing among offerors.

Finally, NVSC contends that the requirement for snow and ice removal services is unduly burdensome and exceeds the government's minimum needs. NVSC says it is highly unlikely snow removal services would be required in the 3 month base period of August, September and October. In addition, NVSC says it is difficult to subcontract for snow removal for less than the full snow season. It argues that if an offeror includes the cost of snow removal for the base contract period of 3 months and there is no snowfall, the contractor would reap a windfall profit at the expense of the government. If the bidder includes the cost of snow removal in its option prices for November and December, or even spreads the cost over the full 5 months, and the options are not exercised, then it would lose money.

In view of the above, NVSC requests that the solicitation be canceled, and an updated wage determination be issued and the government's minimum needs be properly stated.

NVSC filed a supplemental protest after receiving amendments to the solicitation, charging that GSA intentionally failed to send it amendment No. 2 and failed to send amendment No. 3 in a timely manner. NVSC states that amendment No. 3, which included a new wage determination, was sent to it 2 weeks after its issuance on July 15. NVSC argues that it was unaware of the amendment until too late to submit an offer and that while GSA has corrected the principal deficiency in the solicitation it has purposefully acted in a manner intended to preclude NVSC from competing on this procurement. NVSC complains that because it chose to file a protest prior to closing rather than submit an offer, it was precluded from submitting a best and final offer even though the defects in the solicitation had been remedied. It argues that GSA's conduct of this solicitation has been so defective as to prejudice NVSC.

GSA states that prior to issuing the new solicitation it had submitted a request for a new wage determination to the Department of Labor and amendment No. 3 included the new wage determination. Moreover, GSA states that the solicitation was amended (amendment No. 1) to provide for a firm 5-month term, starting in September, and therefore snow removal services were necessary.

Initially, we note that even though NVSC did not submit an offer its interest as a potential competitor is sufficient for it to be considered an interested party. Tumpane Services Corp., B-220465, Jan. 28, 1986, 86-1 C.P.D. ¶ 95.

The Service Contract Act requires that successor contractors pay service employees the same wages and benefits provided for in a collective bargaining agreement, reached as a result of arms-length negotiations, to which the employees would have been entitled if they were employed under the predecessor contract. We have held, therefore, that there is nothing improper in the incorporation into a solicitation of a new collective bargaining agreement in lieu of the revised wage determination that had not yet been received. Aleman Food Service, Inc., B-216143, Nov. 15, 1984, 84-2 C.P.D. ¶ 537.

The record here, however, shows that while the collective bargaining agreement was negotiated during the term of the predecessor contract, it was not to become effective until the proposed start date of the successor contract. In order

for the Service Contract Act to apply, the collective bargaining agreement must be applicable to work performed under the predecessor contract. 49 C.F.R. § 4.163(f) (1986). Aquasis Service Inc., B-220028, Dec. 26, 1985, 85-2 C.P.D. ¶ 717. Since the collective bargaining agreement did not bind the offerors, until a new wage determination was issued, the contracting officer properly included the old wage determination. NVSC's protest on this issue is therefore denied.

Moreover, even if GSA failed to send NVSC amendment No. 2 and failed to send it amendment No. 3 in a timely manner, these amendments were issued after the closing date and NVSC had not submitted an offer. Since the contracting officer properly included the old wage determination and NVSC could have submitted an offer but did not, NVSC was not prejudiced by the failure to timely receive amendments Nos. 2 and 3.

As noted above, GSA amended the solicitation to a firm 5-month requirement covering September through January. This effectively negates NVSC's protest of the snow removal provision as it removes any doubt as to the necessity for snow removal services.

The protest is denied.

Harry R. Van Cleve
General Counsel